

In the
United States Court of Appeals
For the Ninth Circuit

J. J. O'LEARY, Deputy Commissioner, Fourteenth
Compensation District, under the Longshoremen's
Act, *Appellant,*

vs.

COASTAL NAVIGATION COMPANY, a corporation; FIRE-
MEN'S FUND INSURANCE COMPANY, a corporation,
and MRS. GENEVIEVE LONG, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE DAL M. LEMMON, *Judge*

BRIEF FOR APPELLEES

BOGLE, BOGLE & GATES
EDWARD S. FRANKLIN
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HONORABLE DAL M. LEMMON, *Judge*

BRIEF FOR APPELLEES

QUESTION INVOLVED ON APPEAL

Were the findings of appellant, Deputy Commissioner, that decedent Long was a harbor worker under the Longshoremen's and Harbor Workers' Act at the time of his death and not a member of the crew of the D/V "COASTAL GLACIER" in accordance with law? Appellant Deputy Commissioner found decedent was a harbor worker and an employee as defined by the Longshoremen's and Harbor Workers' Act (Tr. 8, 9, 10). The District Court reversed on appeal of the employer and carrier (Tr. 30, 31) holding the Deputy Commis-

sioner had misconstrued the law and that decedent was a member of the crew of the D/V "COASTAL GLACIER" and exempted from the provisions of the Act.

STATEMENT OF CASE

The undisputed evidence before appellant Deputy Commissioner was very adequately summarized by the trial court;

"The decedent Long was a seagoing man, an engineer of years standing. The Coastal Navigation Company had purchased two vessels, the Coastal Glacier and Coastal Forest, and at the time of the purchase contemplated their use in their Alaska run. Each used a complement of nine or ten men. They were taken to task by the Union which demanded some twelve or thirteen in the crew of each vessel. The company decided that the cost of operation was too great with this added operating cost, so, in March, 1947, removed the vessels from Ketchikan, Alaska, to Seattle, Washington, where they were moored at a pier landing at Kirkland on Lake Washington. All of the crews of both vessels were discharged except Long. He was the Chief Engineer on the Coastal Glacier and he was retained in that capacity. He lived on one of the vessels and as custodian had the duty of keeping both clean, trespassers away, etc. His main duty was to keep watch. He also was to oil the machinery and keep the vessels in mechanical condition so that the vessels would be ready for use by charter or otherwise on a day's notice. The Coastal Glacier sailed on short trips on a few occasions and when it did Long went along as the engineer.

"One Haas, who was not a seagoing man, first

talked with Long about taking Long's place while Long would be away in Minnesota on a contemplated trip to that state. Long was then to see the agent of the company about employing Haas. Haas came back to the pier a few days later and found Long stretched out on his bunk in the Coastal Glacier. Long told him he had slipped and fallen while going down to the engine room. Long died from a bilateral hernia with strangulation.

"Haas, after the injury and death of Long, stayed on as the watchman and caretaker of the ships. He likewise lived on one of them although he was not paid subsistence. After Long's death a Mr. Nilsen was employed to turn over the engines and keep them in good working order, and this he does once a month. The vessels are diesel engine powered and required a diesel man to operate and Long was a diesel engineer. Haas was neither a diesel engineer nor a marine engineer. Although the evidence is obscure upon the point it is to be inferred that the operation of the generators, a daily duty of Long, was performed by Haas after he took charge.

"Long was permanently attached to the vessel. He lodged there and he was provided subsistence aboard. He was paid monthly. These are characteristics of employment of crew members. The Coastal Glacier was kept in condition to sail promptly. The owner was endeavoring to obtain satisfactory charters for her and, had she been chartered, a condition of chartering would have been that Long go aboard as engineer. All of the duties performed by Long as detailed above were maritime in character." (Tr. 14 to 17.)

In addition, the evidence disclosed that decedent was created as a seafaring man at the Seattle Marine Hos-

pital for his injuries prior to his death and that the death certificate described his usual occupation as "Chief Engineer" and his occupation as "Shipping" (Tr. 73). After decedent's death, in addition to one Haas, who was employed solely as a caretaker of the vessel, it was necessary to employ another Chief Engineer, one Nitson to inspect and maintain the complicated machinery in the engine room of the "COASTAL GLACIER."

PERTINENT PROVISIONS OF LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Section 2 (3) (Title 33, Section 903 (3) U.S.C.) of the Longshoremen's and Harbor Workers' Act provides as follows:

"(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

This exemption of crew members from the application of the Longshoremen's and Harbor Workers' Act is repeated in §3 (a) (1) of that Act (Title 33, §903 (a) (1) U.S.C.) reading as follows:

"Sec. 3.(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

“(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net”;

Section 21 (b) of the Act (Title 33, Section 921 (b) U.S.C.) provides as follows:

“If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District).”

(Hereafter for the sake of brevity the Logshoremen's and Harbor Workers' Act will be referred to as the “Act”.)

APPEAL PRESENTS QUESTION OF LAW

Whether decedent Long was a member of the crew of the “COASTAL GLACIER” at the time of his accident and exempted from the provisions of the Act is plainly a question of law for this Court to review since the evidence before the Deputy Commissioner was undisputed.

Norton v. Warner Company, 321 U.S. 565, 88 L. Ed. 931;

Tucker v. Branham (3 C.C.A.) 151 F.(2d) 96;

Daffin v. Pape (5 C.C.A.) 170 F.(2d) 622.

On two occasions the United States Supreme Court has been faced with the question before this Court as to whether an injured man was an employee under the Act or exempted by reason of being a "member of the crew" of the vessel.

In *South Chicago Coal & Dock Company v. Bassett* (1940) 309 U.S. 251, 86 L.Ed. 732, it appeared that the decedent was employed on a coal barge navigating only in the inland rivers about Chicago whose chief task was described by the court,

"as 'facilitating the flow of coal from his boat to the vessel being fueled—removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat but did no work while the boat was en route from dock to the vessel to be fueled.' The Court of Appeals thought it significant that his only duty relating to navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fueled vessel while both boats were at rest; that he had no duties while the boat was in motion; that he was paid an hourly wage; that he had no 'articles'; that he slept at home and boarded off ship; that he was called very early in the morning each day as he was wanted; that while he had worked only three weeks, and it might have been possible that he would have been retained for years to come, his employment was somewhat akin to temporary employment."

In properly holding that the duties of the decedent were not of a seafaring character the court said:

“That is our concern here in construing this particular statute—the Longshoremen’s and Harbor Workers’ Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term ‘crew’ in other statutes having other purposes. This Act as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co. v. Haverty*, 272 U.S. 50, 71 L.Ed. 157, 47 S. Ct. 19, *supra*), were still regarded as distinct from members of a ‘crew.’ They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald v. Baltimore & O. R. Co.* (C.C.A. 4th) 71 F.(2d) 810; *Diomedes v. Lowe* (C.C.A. 2d) 87 F.(2d) 296; *Moore Dry Dock Co. v. Pillsbury* (C. C.A. 9th) 100 F.(2d) 245.

“Regarding the word ‘crew’ in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner. The fact that the certificate of inspection called for three ‘deckhands’ and that the captain included the decedent to make up that complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship’s rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as sup-

porting the finding of the deputy commission was the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home, and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water'."

In the subsequent and most recent case involving this question, *Norton v. Warner Company*, 321 U.S. 565, 88 L.Ed. 931 (1944) the deputy commissioner held that a bargeman injured when shifting the barge at a pier was a member of the crew of the barge.

Decedent's duties were found to be as follows:

"Rusin was employed as a boatman on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing or for shorter distances, by the winding up of a cable by means of a capstan operated by hand. The barge, which was documented as a vessel of the United States, never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia. Rusin was employed under a union contract with respondent which stated that all bargemen assigned to specific barges in active operation were to be paid a monthly salary of \$80 and were to be provided with quarters. It also stated that compensation was 'for all work performed by bargemen in the operation of his own vessel' and that the rates provided were 'based upon all services

and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays.' Rusin was continuously aboard. He bought his own meals and lived, ate, and slept on the barge. When he worked on any other boat, he received wages at an hourly rate, in addition to the monthly salary. Rusin had little experience as a seaman except that which he obtained as a bargeman. His duties consisted of taking general care of the barge. They included taking care of the lines at docks, tightening or slackening them as necessary; repairing leaks; pumping out the barge; taking lines from tugs; responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tugboat when being towed; moving the barge at piers by the capstan. He could not set the course or control or change it any time. He was subject to orders of respondent's marine superintendent except when in tow at which time he was subject to the control of the tugboat captain. But he had no duties in connection with the handling of cargo and no shore duties. At the time of the injury he was the sole person aboard or employed upon the barge."

In its opinion the court referred to the legislative history of the Act which was adopted to meet the difficulties of the decision of *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086. The court stressed the fact that the maritime unions specifically opposed inclusion of their membership under the terms of the Act preferring their traditional remedies of wages, maintenance and cure and an action for unseaworthi-

ness in lieu of a compensation act. In holding that the duties of Rusin constituted him a seafaring man the court said:

“If a barge without motive power of its own can have a ‘crew’ within the meaning of the Act and if a ‘crew’ may consist of one man, we do not see why Rusin does not meet the requirements. A barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is a means of transportation on water. A crew is generally ‘equivalent to ship’s company’ as Mr. Justice Story said in *United States v. Winn* (C.C.) 3 Summ. 209, Fed. Cas. No. 16,740. But we pointed out in the *Bassett* case that the word does not have ‘an absolutely unvarying legal significance.’ 309 U.S. at p. 258, 84 L.Ed. 736, 60 S. Ct. 544. We know of no reason why a person in sole charge of a vessel on a voyage is not as much a ‘member of the crew’ as he would be if there were two or more aboard. We said in the *Bassett* case that the term ‘crew’ embraced those ‘who are naturally and primarily on board’ the vessel ‘to aid in her navigation.’ Id. 309 U.S. p. 260, 84 L.Ed. 737, 60 S. Ct. 544. But navigation is not limited ‘putting over the helm.’ It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can ‘hand, reef and steer.’ Judge Hough pointed out in *The Buena Venture* (D.C.) 243 F. 797, 799, that ‘every one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage.’ And see *The Minna* (D.C.) 11 F. 759; *Disbrow v. The Walsh Bros.* (D.C.) 36 F. 607, 608 (bargemen). We think that ‘crew’

must have at least as broad a meaning under the Act. For it is plain from the amendment exempting a 'master or member of a crew' that ship's company was not brought under the Act. And we are told by the Senate Report, as already noted, that the purpose of the legislation was to provide compensation for those who 'are mainly employed in loading, unloading, refitting, and repairing ships.' S. Rep. No. 973, *supra*.

"Rusin, unlike the employee in the *Bassett* case, did no work of the latter variety. He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the functions of any other 'crew' only as they were made so by the nature of the vessel and its navigational requirements. The contract under which he was employed stated that the compensation was 'based upon all services and time required to safeguard and operate the barge fleet.' The services rendered conformed to that standard and no other. Rusin moreover had that permanent attachment to the vessel which commonly characterizes a crew. See *A. L. Mechling Barge Line v. Bassett* (C.C.A. 7th) 119 F.(2d) 995."

PRIOR DECISIONS OF THIS COURT

This court has previously considered the question in the following cases decided before the *Bassett* case; *Union Oil Company v. Pillsburg* (1933) 63 F.(2d) 925 and *Moore Drydock v. Pillsbury* (1938) 106 F.(2d) 245. Subsequent to the *Bassett* case, *supra*, but before the *Norton* case, this court again considered the question in the cases of *Puget Sound Freight Lines v. Mar-*

shall, 125 F.(2d) 878, *Pacific Employers Insurance Company v. Pillsbury* (1942) 130 F.(2d) 21. In both cases the court was concerned with the status of traveling stevedores who lived aboard the vessel who were classified by the court as longshoremen under the Act. In the *Puget Sound Freight Lines* case, the court emphasized the fact that the stevedore had no duties at all to fulfill while the vessel was under way.

In the *Pacific Employers* case, this court adopted the usual classification test for distinguishing between employees under the Act and members of the crew as follows:

“ * * * The distinction between a longshoreman and a crew-member seems to hinge upon whether or not the employee is ‘naturally and primarily on board (the vessel) to aid in her navigation.’ The work done by the claimant had no more relation to navigation than does that performed by a regular longshoreman engaged at a port to assist in loading or discharging the cargo of a boat. As was so well stated in *Carumbo v. Cape Cod S.S. Co.* (1 Cir.) 123 F.(2d) 991, 995, ‘The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a ‘member of a crew’.”

ANALYSIS OF INCIDENTS OF DECEDENT'S EMPLOYMENT

The undisputed evidence in this case unequivocally establishes that the totality of the duties performed by decedent at the time of his death compel his classification as a member of the diesel vessel "COASTAL GLACIER" and therefore exempted as an employee under the Act.

An analysis of the evidence establishes the following facts:

1. Decedent, a seafaring man, had been permanently attached to the D/V "COASTAL GLACIER" as Chief Engineer from August, 1946, until his death on May 7, 1948.

2. Decedent was paid a monthly wage, lived and slept aboard the vessel and received his subsistence customarily furnished crew members.

3. Decedent's duties were concerned primarily with the navigation of the vessel not only when the vessel was underway but when the vessel was at her pier awaiting expected charters.

4. He was required to inspect, maintain and operate the extensive machinery aboard the vessel and keep her in readiness at all times to go to sea.

5. In the event of the vessel going to sea, his employer stipulated as a part of the charter of the vessel that decedent should serve as Chief Engineer while the vessel was operating under such charter.

6. Decedent served as Chief Engineer on various

voyages of the vessel when she was underway between 1946 and 1948.

7. Decedent was furnished his medical treatment at the Seattle Marine Hospital prior to his death.

8. Decedent had to be partially replaced by another marine engineer after his death.

This recapitulation of the incidents of decedent's service aboard the vessel meets all the tests prescribed by this court and United States Supreme Court to establish his status at the time of his death as that of a "seafaring man" (*Moore Drydock Co. v. Pillsbury, supra*).

The duties decedent was actually performing at the time of his death have a significant bearing on his classification (*Long Island Railroad Company v. Lowe*, 145 F.(2d) 516). The evidence establishes he was descending to the engine room in connection with his duties as Chief Engineer when he slipped on a ladder (Tr. 48).

AUTHORITIES SUPPORT DECEDENT'S CLASSIFICATION AS CREW MEMBER

While it is unnecessary to burden the court with the decisional law of other jurisdictions, the following cases support the ruling of the District Court that decedent was a member of the crew:

United States v. Lindgren (4 C.C.A.) 28 F. (2d) 991;

Carumbo v. Cape Cod S.S. Co. (C.C.A.) 123 F.(2d) 991;

Schanz v. American Dredging Co. (5 C.C.A.) 138 F.(2d) 534;

Bowen v. Shamrock Towing Company, 139 F.(2d) 674;

Jones v. Shepherd (Miss.) 20 F. Supp. 345;

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Carvello v. Fregita (Miss.) 42 F. Supp. 404;

Pere Marquette v. Bassett (Mich.) 42 F. Supp. 781.

In the most recent case decided by a United States Court of Appeals, *Daffin v. Pape* (5 C.C.A. 1948) 170 F.(2d) 622, the facts were strikingly similar to those at bar. Daffin's duties were described as follows:

“Daffin sailed with the yacht on every trip; he performed duties essential to the purpose and success of the voyage; and, between trips, while the yacht was in port, he labored to prepare her for the next voyage. For several days prior to the accident, he had worked to put the yacht in readiness

for a trip which was to have started the day after the accident. A few minutes before the accident, he had been checking the engines and filling the gas tanks. The electric power plant was running, and he went into the motor room to cut it off. He pulled the switch, and there was an explosion. From the burns he received, he died. The yacht, at the time was in port, yet it nevertheless must be considered to have been in navigation, for it remained in readiness for another voyage. *Carumbo v. Cape Cod S.S. Co.*, 1 Cir. 123 F.(2d) 991.”

The court held:

“Daffin was on board the yacht to aid in her navigation; his labors contributed to the accomplishment of the main objectives toward which the vessel was engaged, That he had not signed articles and did not eat and sleep aboard the vessel when it was in port, was of no consequence.

“The duties Daffin was performing when he was injured were duties ordinarily performed by a member of the crew, and we think, as did the judge below, that he must be considered, in law, to have been a member of the Vigilant’s crew.”

DECEDENT'S STATUS AS CARETAKER

Appellant Deputy Commissioner's segregated finding that decedent was a caretaker of the vessel and Chief Engineer when the vessel was underway (Tr. 8) completely misconceives the over-all nature of decedent's duties, which were to keep the vessel ready at all times for navigation and to be in charge of the engine room when the vessel was underway.

In *Tucker v. Branham, Deputy Commissioner* (3 C. C.A.) 151 F.(2d) 96, the Deputy Commissioner's findings that a bargee was a caretaker and not a crew member was set aside. The claimant was the sole employee on a non-self-propelled barge operated only in the harbor of Philadelphia. He had no seaman's papers.

His duties were to supervise the loading and unloading of the barge, to unfasten lines and to protect the barge from damage and otherwise safeguard the interests of the owner. In reversing the decision of the Deputy Commissioner and holding Tucker a member of the crew the court said:

"The fact that Dillon was a caretaker is immaterial. He did take care of the barge but no one fact is conclusive. The purpose of the Longshoremen's and Harbor Workers' Compensation Act, as is pointed out in S. Rep. No. 973, 69th Cong., 1st Sess. p. 16, was to provide compensation for persons '* * * mainly employed in loading, unloading, refitting, and repairing ship.' These persons ordinarily are longshoremen and ship-fitters. Dillon was not such. He had some duties in respect to the loading and unloading of the 'Army.' These duties, however, as the court below pointed

out, were for the purpose of making sure that the loading or unloading of the barge was done in such a way that it would not be injured by excessive, strain or capsized by unequal loads. In our opinion Dillon falls within the legal category of Rusin in the *Norton* case rather than in that of Schumann in the *Bussett* case.”

DECEDENT'S RIGHTS TO WAGES, MAINTENANCE AND CURE

Appellant at page 19 of his brief inaccurately suggests decedent was not entitled to the classic remedies of a seaman under the Admiralty Law of wages, maintenance and cure. These remedies accrued to decedent by virtue of his status as a seafaring man. *The Osceola*, 189 U.S. 158. These are not absolute rights but arise under certain well-defined circumstances.

As seafaring men frequently ship without signing written articles, as did decedent, no wages were due decedent at the time of his death.

Any maintenance due and unpaid decedent survived to his wife (*Sperbeck v. Burbank & Company*, 88th F. Supp. 623).

Decedent was receiving his cure in the traditional manner of seamen at the Seattle Marine Hospital at the time of his death at no expense to himself.

There is no indemnity in admiralty for death (*The Harrisburg*, 119 U.S. 199, but an admiralty court would apply the Washington State Death Act if the circumstances warranted it (*Western Fuel Company v. Garcia*, 237 U.S. 233). While the record does not

disclose the circumstances of decedent's death, if it were due to negligence his surviving widow would have an action under the Jones Act.

It is thus apparent that nearly all the admiralty remedies whose retention was demanded by the Seamen's Union in lieu of a compensation act exist in this case.

SUMMARY

In conclusion, since the undisputable evidence establishes decedent's permanent attachment to the D/V "COASTAL GLACIER" of nearly three years of Chief Engineer; further, since decedent's duties were primarily concerned with the safety and navigation of the vessel and the successful functioning of the principal enterprise of the vessel, we submit that Appellant Deputy Commissioner misconstrued the Act in holding that decedent was not a member of the crew of the vessel at the time of his injury and that the decision of the lower court, reversing appellant's decision, should be affirmed by this court.

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